construed, it must protect foreign goods as long as they can be identified, since any prohibition of sale must interfere with importation. Chief Justice Marshall, declaring that some limitation was necessary, tentatively suggested, as the point beyond which the constitutional immunity of imported articles from taxation should not extend, the time "when the goods become mixed with the general property of the state." This has been the recognized criterion ever since, but its indefiniteness has made it difficult to apply.

Seizing on some words in the same opinion which might not have appeared had they not formed part of the statute there construed, later courts sought to establish a more specific line of distinction. Reasoning that packages in the hands of the importer are not mixed with the general property, and that, unless at least one sale is permitted, importation must cease, they considered the earlier case as laying down the rule that measures designed to discourage sale must not be permitted to prevent sale by the importer in the "original package." [2] When importers diminished the size of the shipping packages, so that they were convenient for ordinary retail sales, it became clear that a strict enforcement of the rule so declared, while not beyond the power of the constitution, must interfere with the state's powers of internal regulation to an extent inconsistent with the policy of the court. Lower courts, in dealing with the question, first escaped the difficulty by holding that open boxes, in which the packages were handled, even though they were furnished by the carrier, were the original packages within the rule, and were broken by the sale of separate packages.[3] When the persevering importer shipped the small packages loose, avoiding the use of any box or basket, it was sought to confine the doctrine to packages suitable for wholesale trade.[4] In a decision disallowing that distinction, the federal Supreme Court suggested a further self-imposed limitation on its powers, — that no protection will be extended to original packages whose size has been reduced below that of the customary shipping package, merely for the purpose of escaping state legislation.[5] This was one of the grounds on which a later case was decided,[6] and its unequivocal enunciation in a recent decision of the same court marks its definite establishment in our law. *Cook* v. *County of Marshall*, 25 Sup. Ct. Rep. 233. As has been pointed out in several cases by a consistent group of dissenting justices, it is no less a regulation of interstate commerce to stop the shipment of tobacco in small packages than in large, and the unwillingness of the importer to pay a tax or fine does not prevent his traffic in legitimate articles from being properly classed as interstate commerce. The rule, however, is based on the same principle which was recognized when the constitutional protection was originally limited to goods unmixed with those of the state, in that it gives the state certain independent and necessary powers of regulation, which must be denied if the letter of the law is to prevail.

POWER OF A CORPORATION TO PURCHASE ITS OWN SHARES. — That a corporation has no authority to make a business of trafficking in its own

[2] Leisy *v.* Hardin, 135 U. S. 100 (1890).
[3] Austin *v.* State, 101 Tenn. 563; *In re* Harmon, 43 Fed. Rep. 372.
[4] Commonwealth *v.* Schollenberger, 156 Pa. St. 201. But see Keith *v.* State, 91 Ala. 2; Sawrie *v.* State, 82 Fed. Rep. 615.
[5] Schollenberger *v.* Pennsylvania, 171 U. S. 1 (1898).
[6] Austin *v.* Tennessee, 179 U. S. 343 (1900).

shares is universally admitted.[1] But where a purchase of these shares is merely incidental to the legitimate objects of the corporation, there is no such unanimity of opinion. It is now well established in England and in some jurisdictions of the United States that, in the absence of express authority, a corporation ordinarily has no power to purchase its own shares. But the prevailing American view is that where there is no injury to creditors, the purchase may be made. Thus, such a purchase is permitted where the corporation is solvent. *Burnes* v. *Burnes*, 132 Fed. Rep. 485 (Circ. Ct., W. D. Mo.). But if it would render the corporation insolvent, it is prohibited. *In re S. P. Smith Lumber Co.*, 132 Fed. Rep. 618 (Dist. Ct., N. D. Tex.).

In support of the English doctrine it is urged that to imply the power to purchase would be unfair to creditors and remaining stockholders.[2] Persons who deal with the corporation rely upon the amount of its capital stock and have a right to assume that this asset will remain undiminished. In many cases they may look also to the stockholders themselves for the satisfaction of their claims. If the corporation pays for its own shares out of its capital, it reduces the fund available for creditors and at the same time limits the number of persons to whom the creditors may resort. There is this same limitation in the number of persons liable, even if the purchase is made from the net profits. If such transactions stand, then either the creditors' chances for obtaining payment are lessened or additional burdens are thrown upon the other stockholders. It is further argued, as a practical matter, that such purchases tend inevitably to fraud on the part of the directors, and to dishonest manipulation of the market by the corporation.[3] On the other hand, it is pointed out in defense of the weight of American authority that the arguments based on protection to creditors and other stockholders do not apply where, by a vote of all the stockholders, stock is purchased from the net profits. Although, pending resale, there is a reduced number of stockholders, yet the stockholder who sold can still be held, not upon the discredited fiction of the assets being a trust fund for the creditors,[4] but upon the broader ground that, since practically the stockholders are the debtors, a debtor should not be permitted to secure assets for himself to the injury of his creditors.[5] Besides, protection to corporate creditors is, according to the prevalent American doctrine, a condition of the right to make such purchase. This being so, there would be no unfairness to remaining stockholders as to existing creditors, since no additional burdens would be cast on them. As to subsequent debts there might be an additional burden before the resale, and the consent of all the remaining stockholders should be required to render the sale valid. It is contended, too, that since a corporation may take its shares by way of gift[6] or bequest[7] and may buy them with debts due from the vendor,[8] there is nothing inherent in its nature to prevent this power of purchase.

The solution of the question, on last analysis, seems to turn upon practical considerations. Undoubtedly there are times when the best business

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[1] Ashbury Ry., etc., Co. *v.* Riche, L. R. 7 H. L. 653.
[2] Trevor *v.* Whitworth, 12 App. Cas. 409.
[3] Green Bri., Ultra Vires 95.
[4] Hospes *v.* Northwestern, etc., Co., 48 Minn. 174.
[5] Crandall *v.* Lincoln, 52 Conn. 73.
[6] Lake Superior Iron Co. *v.* Drexel, 90 N. Y. 87.
[7] Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. (Va.) 19.
[8] Taylor *v.* Miami Co., 6 Oh. 176.

management demands that some shares be bought. On the other hand, there is the probability that the power will be abused. The growing tendency in the United States is to allow the possibilities for good to outweigh the fears of harm.

VESTING OF STOCKHOLDERS' RIGHTS IN TRUSTEES. — Under present economic conditions where vast enterprises are carried on by corporations, stability of corporate management is necessary for success. A consistent policy can hardly be maintained if the board of directors is subject to frequent change by the majority stockholders. The mode of welding diverse interests into a common unit for the support of a continuous policy, is the voting trust. Such trusts have frequently been before the courts in cases where it was unnecessary to pass upon their inherent validity or invalidity. It is settled that if the object is illegal, for example, a secret personal advantage to the members of the pool, the agreement is void.[1] On the other hand, where the object is to protect third parties who, in reliance on the agreement, relinquish claims or advance money to the corporation, the trust is good.[2] In at least one square decision, however, the voting trust has been held void as contrary to public policy[3] in that the stockholders should exercise their discretion on the questions submitted to them and should not be allowed permanently to divest themselves of the power of control in favor of those who have no beneficial interest in the corporation, and the New Jersey Court of Appeals has recently taken the same view. *Warren* v. *Pim*, 59 Atl. Rep. 773 (N. J.). There are a number of well-reasoned *dicta* to the contrary;[4] and upon principle, since many of the stockholders in a large corporation scattered throughout the country have no knowledge of the methods of management and are unable to attend the stockholders' meetings, it is difficult to see why such trusts, if formed *bona fide* for the purpose of promoting the interests of the corporation, ought not to be supported. In practice they are most frequently used for the purpose of assuring to reorganized corporations a trustworthy management.

In reorganizing insolvent corporations a somewhat similar plan is frequently adopted. The readjustment of the disordered finances of such a corporation, especially in a manner to suit all concerned, is a difficult problem. Any arrangement by which a going concern is substituted for the insolvent one, benefits both stockholders and bondholders and should be completed as speedily as possible. Consequently, in order to avoid the delay necessarily incident to a submission of every proposed measure to the shareholders or bondholders, the reorganization committee is given legal title with practically unlimited discretionary powers in executing the trust. There would seem to be no serious objection to giving them full discretionary power, in working out the plan of reorganization, to change express stipulations as well as to add new ones, where necessary. It should be merely a question of interpretation whether they have been given such a power or not; but the language of some of the cases would deny the possibility of such

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[1] Shepang Voting Trust Cases, 60 Conn. 553.
[2] Mobile & Ohio R. R. Co. *v.* Nicholas, 98 Ala. 92; Greene *v.* Nash, 85 Me. 148.
[3] Harvey *v.* Linville Improvement Co., 118 N. C. 693.
[4] See Brightman *v.* Bates, 175 Mass. 105; Brown *v.* Pacific Mail Steamship Co., 5 Blatchf. (U. S.) 525.